Agenda

- Labor Law Update
- Wage & Hour Update
- Federal Contractor Update
- Impairment: Medical Marijuana/Prescription Drugs
- Disability & Religious Accommodation
- Update on Background Checks
Labor Law Update
Also known as the “Ambush” Election Rules

Have been a long time coming – originally proposed in June 2011, but were overturned by the federal courts on technical grounds

Now they are back – **and will take effect on April 14, 2015**

We expect an increase in union petitions immediately following the rules implementation date

**NOTE:** These rules are being challenged in federal court, and the parties have asked for an injunction. However, no injunction has yet been granted, so ERs should plan on the rules going into effect as scheduled.
What do the new rules do?
- Dramatically reduce the time from when a union files a petition to when the union election is held – likely as short as 10 – 21 days.
- Require ERs to provide full names, home addresses, telephone numbers, emails, etc., of all EEs eligible to vote in election.
- Require ERs to file a “Statement of Position,” which must raise all issues ER intends to challenge (or else waived).
- Significantly limits issues that may be litigated before election.

Why are these new rules problematic?
- The time between when the petition is filed and election held is crucial. ERs need this time to get their message to EEs.
- Already unions win 2/3 of elections; we expect this number to increase.
The NLRB’s General Counsel has asked the Board to change its joint employer test.

- Joint Employers: a test used by the NLRB to determine if two companies are actually sufficiently connected, in order to impose liability on both companies for any labor violations.

Traditionally (for over 30 years), ERs have been deemed joint employers if two entities actually share or meaningfully affect the control of the employment relationship (e.g., joint involvement in hiring, firing, discipline, supervision, etc.).

The GC is advocating that the joint employer test be determined based on the totality of the circumstances, including the “potential” control and the “economic realities or dependence” of the ERs.
And it’s not just staffing companies – the NLRB General Counsel has also issued complaints against McDonald’s and its franchisees.

Why is the Board interested in redefining the joint employer standard?

- Allows the union to exert pressure directly on the corporation
- Expands the pie of ERs who can be unionized
- Makes organizing easier for unions
- Opens the door to larger scale organizing
- Will require ERs to examine their relationship with their staffing company
Multi-Employer Pension Plan Problems

- EE defined benefit plans created by collective bargaining agreements
- Many ERs all pay into the same pension plan, which pays out benefits to EEs from many different companies
  - Think Social Security
  - Like Social Security, almost all of these plans are underwater
  - Many, if not most, multi-employer plans are seriously underfunded
- Under federal pension law, ERs are responsible for a portion of the unfunded liabilities
- What does this mean? If an ER quits paying into a plan, the ER will be assessed “withdrawal liability.”
- Depends on size of company and plan, but can be millions of dollars.
What should ERs do?

- If you are in a multi-employer pension plan, consider whether you can live with the exposure
- If not, consider exiting the union pension plan in your next union contract negotiation
- Watch out for annual letters from Pension Plan
  - Plan is obligated to tell you if it is underfunded
- Ask the Plan for an estimate of your withdrawal liability
  - Plan is also obligated to provide this to you upon request
Wage & Hour Update
In March 2014, President Obama directed the DOL to “modernize and streamline” the exemption test under the FLSA

Exempt EEs are EEs who meet a salary and duties test – and therefore can be paid salary (i.e., don’t receive overtime pay)

- Salary Test: paid at least $455 / week
- Duties Test: (1) executive; (2) administrative; (3) professional; or (4) outside sales

The new rules are expected to:

- Raise the salary test significantly – perhaps as high as $900-$1,000 / week
- Make the duties test harder to comply with
Other W&H Issues

- Classification of EEs
- Including bonus pay in overtime calculation
- Security checks
- Got Interns?
Federal Contractor Update
Who is a Federal Contractor?

“50-50” Test

- $50,000 / 50 EEs
- **Written AAP Required**
  - Generally, if you have gov’t business worth more than $50,000 and you have 50 or more EEs
- Must follow non-discrimination and related provisions as well

$10,000 Test

- Generally, if you have gov’t business totaling at least $10,000
- **Written AAP NOT Required**
- **BUT**, still required to follow non-discrimination and related provisions
Am I a Federal Contractor?
- Primary contractors – you signed a deal with the government

Subcontractors
- Direct contact with the government
- Subcontractor to federal government contractor
- Connected to the goods and/or services ultimately benefiting a government contractor.
- The dollar amounts for obligation requirements are the same as for primary contractors
Last year the OFCCP promulgated new regulations for federal contractors

These regulations are already in effect, so federal contractors should already be complying

New Regulations – Veterans and Disabled EEs
- 8% Hiring Benchmark (Veterans)
- 7% Utilization Goal (Disabled Employees)
- Invitation to Self-Identify
- Mandatory Subcontract Clauses
- OFCCP Records Access
- Outreach Programs
OFCCP will demand your AAP and hiring records for the previous 3 years
  - Looking for discrimination
  - Will perform a compensation analysis to ensure you are paying male and female employees equally

If you don’t have an AAP?
  - Enforcement Proceedings
  - On-site Investigations
  - Loss of Federal Contract
  - Federal contract bar
  - Fines
  - “Remedial measures”
2014 saw several increased burdens for Federal Contractors

- President Obama signed several presidential memoranda into law
  - Minimum wage increase ($10.10/hr.)
  - Guidance on gender identity and sex discrimination
Impairment:
Medical Marijuana / Prescription Drugs
Medical Marijuana & EE Impairment

- Has become an increasingly hot issue
- Currently there are 24 states that have enacted medical marijuana laws (including Washington, D.C.)
- All of these laws differ in varying respects

RECOMMENDATIONS:

- Consider revising your drug policy to ensure it complies with your state’s law
- Review your job descriptions & designate appropriate ones as safety-sensitive
- Train supervisors & managers on recognizing impairment
Disability & Religious Accommodation
Disability Accommodation
  
  - Must provide a reasonable accommodation to disabled EEs (or applicants), provided that such accommodation does not constitute an undue hardship
  - Must engage in the interactive process

Religious Accommodation – similar accommodation obligations to those required for disabled EEs
  
  - Often seen with Seventh Day Adventists and Muslim EEs
Recommendations for Successful Accommodation

- Train your supervisors & managers on accommodation requirements
- Pay special attention to your documentation and create a complete record throughout the accommodation / interactive process
- Modify your disability accommodation paperwork to address religious accommodation requests as well
- Ask EEs to submit requested accommodations in writing
Update on Background Checks
EEOC recommends:
- Uniform approach
- Use same assessment & disqualification criteria for all applicants
- Watch out for disparate impact
- No blanket exclusions for applicants with criminal records

EEOC policy on background checks

EEOC brings cases against companies based on use of background checks
- Interestingly – Kaplan points out that EEOC itself uses similar background checks policy as policy the Agency is challenging

EEOC issues joint resources on background checks along with FTC

EEOC recommends:
- Uniform approach
- Use same assessment & disqualification criteria for all applicants
- Watch out for disparate impact
- No blanket exclusions for applicants with criminal records
Fair Credit Reporting Act applies whenever running background checks through a 3rd party

Requirements:

- Before running a background check, ERs must provide EEs or applicants with:
  1. A clear & conspicuous written disclosure that a background check may be obtained for employment purposes
  2. The disclosure, including a written authorization by the individual, must be in a stand-alone document

- If the ER takes adverse action based on background check, ER must provide individual copy of report and summary of rights

Reminder: Remember that many states have their own requirements
Thank you – Any Questions?

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